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12 **UNITED STATES BANKRUPTCY COURT**
13 **DISTRICT OF NEVADA**

14 In re:

15 USA COMMERCIAL MORTGAGE
16 COMPANY,

17 USA CAPITAL REALTY ADVISORS,
18 LLC,¹

19 USA CAPITAL DIVERSIFIED TRUST
20 DEED FUND, LLC,

21 USA CAPITAL FIRST TRUST DEED
22 FUND, LLC,²

23 USA SECURITIES, LLC,³ Debtors.
24

25 **Affects:**

26 All Debtors
 USA Commercial Mortgage Company
 USA Capital Realty Advisors, LLC
 USA Capital Diversified Trust Deed Fund, LLC
 USA Capital First Trust Deed Fund, LLC
 USA Securities, LLC

Case No. BK-S-06-10725-LBR¹
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR²
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**AMENDED FIRST OMNIBUS
OBJECTION OF USACM TRUST TO
PROOFS OF CLAIM BASED, IN
WHOLE OR IN PART, UPON
INVESTMENT IN THE ARAPAHOE
LAND INVESTMENTS, LP LOAN
(AMENDED TO CORRECT
EXHIBIT)**

Date of Hearing: October 19, 2009
Time of Hearing : 3:00 p.m.

New Date of Hearing: November 13, 2009
Time of Hearing: 9:30 a.m

25 The USACM Liquidating Trust (the “USACM Trust”) moves this Court, pursuant
26 to § 502 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) and
Rule 3007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for an

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

1 order disallowing the Proofs of Claim filed by individual investors (“Direct Lenders”)
2 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are
3 based upon an investment in the Arapahoe Land Investments, LP Loan (the “Clear Creek
4 Loan”). This Objection is supported by the Court’s record and the Declaration of Edward
5 M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment
6 in the Clear Creek Loan filed with the Court today (the “Burr Decl.”).

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. BACKGROUND

9 1. On April 13, 2006 (“Petition Date”), USA Commercial Mortgage Company
10 (“USACM”), USA Securities, LLC, USA Capital Realty Advisors, LLC, USA Capital
11 Diversified Trust Deed Fund, LLC, and USA Capital First Trust Deed Fund, LLC
12 (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of the
13 Bankruptcy Code. Debtors continued to operate their businesses, if any, as debtors-in-
14 possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtors’ post-
15 petition management of the Debtors was under the direction of Thomas J. Allison of
16 Mesirow Financial Interim Management, LLC (“Mesirow”), who served as the Chief
17 Restructuring Officer.

18 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
19 business of underwriting, originating, brokering, funding and servicing commercial loans
20 primarily secured by real estate, both on behalf of investors and for its own account.

21 3. That business included the solicitation of individual investors to purchase
22 fractional interest in loans that USACM originated and then serviced. These investors,
23 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in
24 USACM’s bankruptcy case and in this Objection.

25 4. On September 14, 2006, the Court entered its Order Setting Deadline to File
26 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The

1 Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as
2 the deadline (“Bar Date”) for creditors to file proof of claims.

3 5. On September 25, 2006, Debtors served a copy of the Bar Date Order on
4 their service lists [Docket No. 1358]. All Creditors were served with a copy of the Bar
5 Date order as well [Docket No. 1358].

6 6. On November 6, 2006, a stipulation was filed and an order entered extending
7 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket
8 No. 1729].

9 7. On January 8, 2007, this Court entered its Order Confirming the “Debtors”
10 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.
11 2376] (the “Confirmation Order”).

12 8. As part of the Plan, USACM sold the servicing rights to most of the loans it
13 serviced to Compass Financial Partners, LLC, including the Clear Creek Loan. The sale to
14 Compass Financial Partners closed on February 16, 2007.

15 9. Under the Plan, the USACM Trust is the successor to USACM with respect
16 to standing to seek allowance and disallowance of Claims.

17 10. On information and belief, Silar Advisors foreclosed on its loan(s) to
18 Compass Financial Partners in September 2008 and alleges that it has become the
19 successor servicer to the Clear Creek Loan and the Direct Lenders thereto.

20 11. Under the Plan, unsecured claims of Direct Lenders against USACM are
21 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in
22 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share
23 of the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,
24 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and
25 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”

1 12. The USACM Trust exists as of the Effective Date of the Plan, which was
2 March 12, 2007. Geoffrey L. Berman is the Trustee.

3 13. **Exhibit A** attached, lists Proofs of Claim filed by Direct Lenders that appear
4 to be based, in part, upon an investment in the Clear Creek Loan. (Burr Decl. ¶ 7.)
5 **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the
6 total amount of the claim and the total amount of the claim that appears to be related to an
7 investment in the Clear Creek Loan based upon the information provided by the claimant.
8 (Burr Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the Clear
9 Creek Claims.

10 **II. JURISDICTION**

11 14. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334
12 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
13 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

14 15. The statutory predicates for the relief requested herein are 11 U.S.C. § 502
15 and Bankruptcy Rule 3007.

16 **III. APPLICABLE AUTHORITY**

17 16. Under the Bankruptcy Code, any Claim for which a proof of claim has been
18 filed will be allowed unless a party in interest objects. If a party in interest objects to the
19 proof of claim, the Court, after notice and hearing, shall determine the amount of the
20 Claim and shall allow the Claim except to the extent that the Claim is "unenforceable
21 against the debtor . . . under any . . . applicable law for a reason other than because such
22 claim is contingent or unmatured." 11 U.S.C. § 502(b).

23 17. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.
24 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such
25 objections has been extended to October 7, 2009, by this Court's orders.

1 18. A properly filed proof of claim is presumed valid under Bankruptcy Rule
2 3001(f). However, once an objection to the proof of claim controverts the presumption,
3 the creditor ultimately bears the burden of persuasion as to the validity and amount of the
4 claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*,
5 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate
6 burden of proof as to the validity of a proof of claim "remains at all times upon the
7 claimant." *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035,
8 1039 (9th Cir. 2000).

9 **IV. THE CLEAR CREEK LOAN DIRECT LENDERS**

10 19. On March 15, 2005, Arapahoe Land Investments, LP made and delivered to
11 various lenders, including the Direct Lenders identified in **Exhibit A**, a Promissory Note,
12 in an amount of \$2,150,000 (the "Note"). Through subsequent amendments, the loan
13 amount was increased to \$2,900,000.

14 20. The Loan was secured by a Deed of Trust, Assignment of Rents, Security
15 Agreement and Fixture Filing ("Deed of Trust") on real property and improvements
16 thereon, as described in the Deed of Trust. The Deed of Trust was recorded on April 13,
17 2005 at Instrument Number 2005023121 in the Official Public Records of Real Property in
18 Galveston County, Texas.

19 21. According to the Mesirow Financial "Loan Summary" dated February 28,
20 2007, the loan was "performing." Thus, when the servicing rights were transferred to
21 Compass Financial Partners the loan was performing.

22 22. Based on information provided by Silar as successor to Compass, since the
23 loan was transferred to Compass, the borrower paid off the remainder of the loan and the
24 Direct Lenders on the Clear Creek Loan were paid in full.

1 **V. THE OBJECTIONS**

2 23. The Direct Lenders fail to state a claim as the Direct Lenders have not been
3 damaged. Upon information and belief, the Direct Lenders have been repaid in full, and
4 consequently have no claim against the USACM estate.

5 24. To the extent the Direct Lenders have not been paid in full, the Direct Lenders
6 still fail to state a claim as USACM has not breached the servicing contract. USACM was
7 under no duty to foreclose on the property securing the Clear Creek Loan though a Notice
8 of Default was sent to the Borrower and guarantors during the pendency of the USACM
9 bankruptcy and prior to the sale of the servicing rights to Compass Financial Partners. To
10 the extent the property's value dropped since USACM sold the servicing rights pursuant to
11 the Plan of Reorganization, USACM is no longer a party to any servicing contract and
12 consequently has no rights, duties, or obligations thereunder.

13 25. USACM did not guarantee the Direct Lenders' investment in the Clear Creek
14 Loan. The Direct Lenders took a known risk by investing. Accordingly, USACM is not
15 liable for the Borrower's default or any decrease in the value of the collateral caused by
16 the downturn in the real estate market.

17 ///

18 ///

1 **VI. CONCLUSION**

2 The USACM Trust respectfully requests that the Court disallow the claims listed in
3 **Exhibit A** to the extent those claims are based upon a Direct Lender investment in the
4 Clear Creek Loan. The USACM Trust also requests such other and further relief as is just
5 and proper.

6 Dated: September 24, 2009.

7 LEWIS AND ROCA LLP

8
9 By /s/ Marvin Ruth (#10979)
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18 *Attorneys for the USACM Liquidating Trust*

19 Copy of the foregoing and pertinent
20 portion of Exhibit A mailed by first
21 class postage prepaid U.S. Mail on
22 September 24, 2009 to all parties listed
23 on Exhibit A attached.

24 LEWIS AND ROCA LLP

25 /s/ Leilani Lista
26 Leilani Lista